Filed 8/2/10 Kinder v. Allied Interstate CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

JAMES M. KINDER, Plaintiff and Appellant, v. ALLIED INTERSTATE, INC., Defendant and Respondent. [AND 74 OTHER CASES.]	E047086 (Super.Ct.No. GIC880543) OPINION

APPEAL from the Superior Court of San Diego County. Ronald L. Styn, Judge. Affirmed.

David A. Kay for Plaintiff and Appellant.

Lewis, Brisbois, Bisgaard & Smith, Jeffry A. Miller, Tim J. Vanden Heuval, Matthew B. Stucky; Manatt Phelps & Phillips, Becky S. Walker and Andrew H. Struve for Defendants and Respondents Allied Interstate, Inc. et al.

La Bella & McNamara, Thomas W. McNamara and Daniel M. Benjamin for Defendant and Respondent Time Warner Cable.

Murchison & Cumming, Kenneth H. Moreno and Scott J. Loeding for Defendant and Respondent Evergreen Professional Recovery, Inc.

Ellis, Coleman, Poirier, La Voie & Steinheimer, Mark E. Ellis and Andrew M. Steinheimer for Defendant and Respondent Bay Area Credit Services.

Debbie P. Kirkpatrick for Defendant and Respondent NCO Financial Systems, Inc.

The trial court consolidated approximately 165 separate suits filed by plaintiff James M. Kinder (Kinder) alleging violations of the Telephone Consumer Protection Act of 1997 (TCPA). (47 U.S.C. § 227 et seq.)[1] The court segregated the cases into three groupings. Seventy-five defendants in the grouping known as "the non-telemarketing cases" (hereinafter "defendants") filed or joined in a motion seeking to have Kinder, a previously declared vexatious litigant, post a security bond pursuant to Code of Civil Procedure section 391.1.[2] The court granted the motion and set Kinder's security bond in the amount of $1.5 million. Kinder failed to post the bond and the "non-telemarketing" cases were dismissed.[3] On appeal, Kinder contends the court erred in determining that he

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[1] The TCPA provides individuals with a private right of action for remuneration with respect to the receipt of certain statutorily specified, unsolicited telephonic communications. (*Boydston v. Asset Acceptance LLC* (N.D. Cal. 2007) 496 F.Supp.2d 1101.)

[2] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

[3] The other two case groupings were denoted the "Telemarketing cases" and the "Facsimile cases." The court later created a fourth grouping, the "residential phone cases." At least two individual defendants settled with plaintiff; one, a member of the

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was a vexatious litigant within the meaning of the statute, and in determining that there was no reasonable probability he would prevail in the litigation. We affirm.

FACTUAL AND PROCEDURAL HISTORY

Kinder operated a rental car business in which he used a pager. In September 1996, Kinder inadvertently destroyed his pager. He called the company handling his service and requested a new one. Kinder indicated he was interested in knowing if any new blocks of pager numbers had been released. He learned the number 619-999-9999 was available. Kinder believed the number was valuable because no one would ever forget it. He was able to obtain the number by paying a "tip" to the servicer.

Kinder soon learned that the pager number was unusable due to the sheer volume of pages he received. During the number's first 20 hours in operation, Kinder received 184 pages not intended for him. Kinder eventually received as many as 63,000 unwanted pages per month. Thus, he was never able to engage in any business or corresponding advertising with the number other than initially informing acquaintances by word of mouth. He later learned that it was standard practice in the industry of automated dialing to "9 in" or "9 out" a number, i.e., when an industry engaged in automated dialing has the name of an individual in its database, but no corresponding phone number, it will

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"telemarketing cases," and the other, a member of the "fax cases." The court later ordered the "fax cases" to proceed individually. The remainder of the cases appear to have remained active in their respective groupings as of the time of the dismissal in the instant grouping of cases.

automatically fill-in the blank phone number in its system with all nines and call that number.

Within a week or two of acquiring the number, Kinder obtained a waiver of all overage charges—those charges above his flat monthly fee. While initially he was permitted 400 calls per month, calls exceeding that number cost him $.10 each. Thus, due to the volume of calls he received he would have been required to pay thousands of dollars in overage charges per month. At some point thereafter, he disconnected the pager service, converting it to a stand-alone voicemail: "You have to understand, I didn't keep the number activated very long with that pager." Kinder then paid a flat monthly fee for operation of the number.

Kinder created intake logs and hired staff to record the calls he continued to receive. In 1999, Kinder began issuing demand letters to purported violators requesting settlements and threatening to file lawsuits if settlements were not paid. Around May or June 1999, Kinder began filing hundreds of lawsuits. On May 21, 2003, Kinder was proclaimed a vexatious litigant. Kinder subsequently filed numerous applications for leave to file actions pursuant to section 391.7.[4] Many, if not most or all of those applications, were denied.

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[4] Section 391.7, subsection (a) provides that an order declaring a litigant to be vexatious may require the litigant to obtain leave of the presiding judge of any court where that litigant proposes to file new litigation. The order declaring plaintiff a vexatious litigant is not a part of this record; however, we have obtained a copy from the Judicial Council and take judicial notice of that order on our own motion. That order expressly requires that plaintiff obtain a prefiling order prior to filing any new litigation.

Kinder, represented by an attorney, initiated the current action against defendant Allied Interstate on February 6, 2007, alleging a single cause of action.[5] Kinder contemporaneously filed a declaration pursuant to section 391.7 seeking permission to file the instant action as a vexatious litigant. The trial court granted his request. Defendants filed a motion to require Kinder to post security as a vexatious litigant. The court granted the request. Kinder failed to post the bond and the "non-telemarketing" cases were dismissed.

DISCUSSION

A. VEXATIOUS LITIGANT STATUS

1. *SUFFICIENCY OF THE EVIDENCE THAT KINDER WAS A VEXATIOUS LITIGANT*

Kinder contends on appeal, as he did below, that defendants adduced insufficient evidence that he was a vexatious litigant within the meaning of the statute. Defendants respond that Kinder's declaration for permission to file the current action as a vexatious litigant, his numerous previous requests for permission to file actions as a vexatious litigant, and his name's appearance on the list of vexatious litigants maintained by the Administrative Office of the Courts amounted to sufficient evidence for the court to

[5] In the declaration attached to the complaint against Allied Interstate, Kinder averred that he had received 20 calls from Allied Interstate occurring between February 26, 2003, and February 6, 2006, all in violation of the TCPA. The complaints filed against the remaining consolidated defendants in the "non-telemarketing cases" are not a part of the record on appeal.

conclude that Kinder was a vexatious litigant subject to posting a security bond. We agree with defendants.

Section 391.1 provides that "a defendant may move the court, upon notice and hearing, for an order requiring the plaintiff to furnish security. The motion must be based upon the ground, and supported by a showing, that the plaintiff is a vexatious litigant and that there is not a reasonable probability that he will prevail in the litigation against the moving defendant." A vexatious litigant is defined by statue as a person who does any of the following: "(1) In the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing. [¶] (2) After a litigation has been finally determined against the person, repeatedly relitigates or attempts to relitigate, in propria persona, either (i) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (ii) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined. [¶] (3) In any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay. [¶] (4) Has previously been declared to be a vexatious litigant by any state or federal court of record in any

action or proceeding based upon the same or substantially similar facts, transaction, or occurrence." (§ 391, subd. (b)(1)-(4).)

The Judicial Council is required to maintain a list of those persons declared a vexatious litigant and disseminate that list annually to the clerks of all courts in California. (§ 391.7, subd. (e).) A vexatious litigant determination is permanent unless and until the vexatious litigant successfully files a motion to lift the prefiling order. (*Lucket v. Panos* (2008) 161 Cal.App.4th 77.) In ruling on the motion to provide security, the trial court may weigh the evidence presented on the motion; it is not required to assume the truth of the plaintiff's alleged facts. (*Moran v. Murtaugh Miller Meyer & Nelson, LLP* (2007) 40 Cal.4th 780, 782 (*Moran*).) "On appeal, of course, we presume the order is correct and we imply such findings as are necessary to support it. [Citations.]" (*Devereaux v. Latham & Watkins* (1995) 32 Cal.App.4th 1571, 1582 (*Devereaux*) disapproved of in *Moran*, at p. 785, on other grounds.) We determine only whether substantial evidence supports the court's determination. (*Devereaux*, at p. 1582.)

Kinder, while admitting that he was declared a vexatious litigant, contends the trial court was required to find that he fell within one of the four delineated subdivisions of the above quoted statute prior to requiring that he post a security bond. He notes that defendants below adduced no evidence that he came within any of the four subcategories of vexatious litigants; hence, he maintains the court erred in determining that he was a vexatious litigant.

We hold that such a construction of the vexatious litigant statutes is inconsistent with its intended purpose and effect. (*First Western Development Corp. v. Superior*

Court (1989) 212 Cal.App.3d 860, 867 [purpose of vexatious litigant statutes is to require vexatious litigant to put up reasonable costs of obsessive and persistent conduct which can cause serious financial costs to the object of the litigation].) Rather, the trial court's reference to the Administrative Office of the Court's list of vexatious litigants attached to defendants' motion was, in and of itself, sufficient evidence that defendant was a vexatious litigant subject to the posting of a security bond.[6] Indeed, if Kinder's interpretation was correct, every time a defendant moves to compel a vexatious litigant to seek a prefiling order or post a security bond, it would be required to relitigate a determination that had already been made by another court. This would multiply the expense and efforts exerted by defendants in pursuing their statutory protections against litigious plaintiffs; a result in direct contravention of the purpose of the vexatious litigant statutes. Moreover, it would render the requirement that the Judicial Council maintain and disseminate a list of vexatious litigants meaningless, for the list would serve no purpose if not to notify courts that the individuals enumerated therein were subject to prefiling orders and the posting of security bonds. Thus, substantial evidence supported the trial court's determination that Kinder was a vexatious litigant subject to posting a security bond.

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[6] We note that the court expressly indicated in its order requiring the posting of the bond that it had before it the original order declaring plaintiff a vexatious litigant on May 21, 2003. Counsel for one of the defendants later requested the court attach a copy of that order to its bond order. The court agreed to do so. Unfortunately, it is apparent from the record that the court never did. As discussed in footnote No. 2 *ante*, we have obtained a copy of that order from the Judicial Council and take judicial notice of it.

2. *APPLICABILITY OF VEXATIOUS LITIGANT STATUTES TO VEXATIOUS LITIGANTS REPRESENTED BY COUNSEL*

Kinder contends that even if the court correctly determined that he was a vexatious litigant subject to the posting of a security bond, the statute was inapplicable to him because he was represented by counsel in the current action. Defendants respond that the vexatious litigant statutes are applicable to previously declared vexatious litigants regardless of whether they are represented by attorneys in subsequent actions. We agree with defendants.

"The fact that plaintiff secured an attorney to lend his name to the subsequently filed complaint avails him naught. The provisions of the vexatious litigant statute . . . do not preclude a stay or dismissal because an attorney is used in the action in which the motion is made. [Citations.] Therefore, the use of an attorney . . . should not deprive the court of the power to protect itself from abuse of the judicial process." (*Muller v. Tanner* (1969) 2 Cal.App.3d 438, 444.) "A plain reading of the statute indicates the Legislature intended it to apply . . . to persons currently represented by counsel whose conduct was vexatious when they represented themselves in the past." (*Camerado Ins. Agency, Inc. v. Superior Court* (1993) 12 Cal.App.4th 838, 842 (*Camerado*).) "The legislative purpose would be frustrated by a construction of the statute which would permit a vexatious litigant to avoid the protection afforded potential targets simply by obtaining counsel." (*Ibid.*; see also *In re Shieh* (1993) 17 Cal.App.4th 1154, 1166, *Wolfgram v. Wells Fargo Bank* (1997) 53 Cal.App.4th 43, 49 and *Forrest v. State of California Dept. of*

Corporations (2007) 150 Cal.App.4th 183, 195-196 for instances where the statutes have been applied to vexatious litigants represented by counsel.)

Kinder acknowledges *Camerado*, but contends that case was wrongly decided. We find no reason to contradict such a long-standing and well-settled area of the law. Indeed, *Camerado*'s in-depth analysis of the issue including commentary subsequent to the initial enactment of the statutes, and notation that the Legislature was presumably aware of the previous judicial construction of the statutes when it amended them in 1990, strongly supports its conclusion that the statutes were intended to apply to vexatious litigants represented by counsel. As *Camerado* ultimately determined, "A review of the 1990 amendments demonstrates the Legislature's intent to broaden the reach of the vexatious litigant statute." (*Camerado, supra,* 12 Cal.App.4th at p. 843.)

B. NO REASONABLE PROBABILITY OF PREVAILING

Kinder contends the court erred in determining that he had no reasonable probability of prevailing in the litigation. We disagree.

"Section 391.3 provides: 'If, after hearing the evidence upon the motion, the court determines that the plaintiff is a vexatious litigant and that there is no reasonable probability that the plaintiff will prevail in the litigation against the moving defendant, the court shall order the plaintiff to furnish, for the benefit of the moving defendant, security in such amount and within such time as the court shall fix.' [Citation.]" (*Moran, supra,* 40 Cal.4th at p. 784, fns. omitted.) "Section 391.4 provides: 'When security that has been ordered furnished is not furnished as ordered, the litigation shall be dismissed as to the defendant for whose benefit it was ordered furnished.'" (*Id*. at p. 783, fn. 3.)

In ruling on the motion to provide security, the trial court may weigh the evidence presented on the motion; it is not required to assume the truth of the plaintiff's alleged facts. (*Moran*, *supra*, 40 Cal.4th at p. 782.) "On appeal, of course, we presume the order is correct and we imply such findings as are necessary to support it. [Citations.]" (*Devereaux*, *supra*, 32 Cal.App.4th at p. 1582.) We review the trial court's order for substantial evidence. (*Ibid*.)

1. *CALLS MADE WHILE THE PAGER WAS DISCONNECTED*

It is unlawful for any person to make a call utilizing an automatic telephone dialing system "to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call." (47 U.S.C., § 227(b)(1)(A)(iii).)

We find substantial evidence supported the trial court's determination that Kinder had no reasonable probability of prevailing in his litigation with respect to those calls made while his pager was disconnected. Ample evidence supported defendants' contention that Kinder did not have a "telephone number assigned to a paging service" at any time period that was the subject of the instant litigation. In support of their motion to require Kinder to post a security bond, defendants submitted the declaration of Kimberly Edwards, the custodian of records for Arch Wireless/USA Mobility, the service provider for Kinder's pager service. In that declaration, Edwards averred that "the number (619) 999-9999 is not currently connected to a pager, and has not been connected to a pager at any time since the year 2002. It is a stand-alone voice mail." She further declared that

"Arch Wireless/USA Mobility's records reflect that there are no data communications, by transmission of coded radio signals or any other method, sent to a mobile device for the number (619) 999-9999 to alert the account holder when a message or call to this number is received. [¶] Arch Wireless/USA Mobility's records reflect that Mr. Kinder is not currently assigned paging service for the number (619) 999-9999, nor is Mr. Kinder alerted by paging service that a call has been made to or received by that number. [¶] . . . [¶] In order to receive messages from the stand-alone voice mail, Mr. Kinder must periodically call his voice mail and check for messages. He is able to do this by calling his voice mail and entering a password. The message(s), if any, are then played back to him."

In his deposition testimony Kinder admitted that he did not keep the pager service with the number activated for very long, implicating an even earlier date than that reflected in Edwards's declaration. While Kinder reactivated his pager service in May of 2007, he conceded that "the vast majority, if not all, of the calls in the cases where [liaison counsel] is defense counsel involve[d] calls made prior to May, 2007 (when Mr. Kinder turned on his pager)." This, again, implicates that the vast majority, if not all, of the calls made by defendants to Kinder were during the period his pager was inactive. The statute of limitations on a TCPA action is four years. (*Sznyter v. Malone* (2007) 155 Cal.App.4th 1152, 1167-1168.) Kinder's current action was filed on February 6, 2007. Thus, sufficient evidence supported the trial court's determination that Kinder's pager had been deactivated for the entire time period for which he was claiming damages in the instant case with respect to those calls made prior to his reconnection of the pager.

Kinder did not dispute below, and does not argue on appeal, that his pager was connected during the subject time frame. Rather, he argues that whether it was connected or not is immaterial. According to Kinder, the fact that his number was assigned to a paging service, active or not, was the determinative factor.[7] We disagree. Reading the statute as a whole, the statement of congressional findings, and case law interpreting the statute reveals that its primary purpose was to preserve the privacy rights of owners of the subject devices from the harassment and annoyance of persistent intrusive interruption by telemarketers or other unwanted callers. (47 U.S.C., § 227; *Moser v. F.C.C.* (C.A.9 Or. 1995) 46 F.3d 970; *Oklahoma ex rel. Edmondson v. Pope* (W.D.Okla.2007) 505 F.Supp.2d 1098; *Minnesota ex rel. Hatch v. Sunbelt Communications and Marketing* (D.Minn.2002) 282 F.Supp.2d 976.) Indeed, as the trial court noted, it was "persuaded the number must be assigned to one of the enumerated devices that is *operated* as assigned . . . . [A]ny other interpretation is clearly contrary to the purpose of the TCPA—to prevent wireless device users from receiving and paying for calls from

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[7] Kinder additionally argued below that regardless of whether his pager was connected, it was still a wireless device and, hence, still came under the TCPA provision for "cellular telephone service." (47 U.S.C. § 227(b)(1)(A)(iii).) We disagree. A "cellular telephone service" denotes a mobile cellular telephone. No evidence in the record suggests that Kinder's device was a cellular telephone. Rather, the evidence suggests that it was a "pager" or "beeper," which was no longer wirelessly connected to his service provider. Indeed, Edwards declared that "no data communications, by transmission of coded radio signals or any other method, [were] sent to a mobile device for the number (619) 999-9999 to alert the account holder when a message or call to this number [was] received"; Kinder was not "alerted by paging service that a call ha[d] been made to or received by that number"; and "[i]n order to receive messages from the stand-alone voice mail, Mr. Kinder must periodically call his voice mail and check for messages." Thus, by deactivating his pager service, Kinder's number was no longer a device connected to a wireless service.

unwanted solicitors." "The TCPA is not intended to apply to circumstances such as is presented in this case where the Plaintiff intentionally subjects himself to unwanted telephone calls and disconnects the number from his pager device, connects the number to a voice mail tape-recording system and employs a staff to listen to the voice mail messages and catalog the calls for the sole purpose of filing lawsuits." "The court finds [Kinder]'s conduct of intentionally subjecting himself to unwanted telephone calls, as a matter of policy, precludes [Kinder]'s recovery under the TCPA." Thus, substantial evidence supported the court's order.[8]

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[8] In their briefs, the parties addressed at length the applicability of the assumption of risk doctrine to the present case. Indeed, the trial court found, as an independent basis for determining that plaintiff had no reasonable probability of prevailing in his litigation, that plaintiff had assumed the risk of the calls. However, it was unclear from the record or the briefs whether the parties contended that the court had ruled, properly or not, that the assumption of the risk doctrine applied to all the calls made to plaintiff's pager number in the instant case, or merely those made after reconnection of his pager. Indeed, the briefs of several parties insinuate the trial court applied the assumption of risk doctrine to all calls made to plaintiff's pager, even those preceding his disconnection of the service. At oral argument, however, it was made clear that the parties believed the assumption of risk doctrine was applied only to those calls made after plaintiff reconnected his pager in May 2007. As we noted above, we have neither all of the operative complaints nor a list of all the calls that were the subject of the consolidated cases. Thus, in our tentative opinion, we found Kinder's deactivation of his pager dispositive of the issue in its entirety, in our belief that all of the subject calls had been made prior to Kinder's reactivation of the pager. Indeed, in his deposition testimony, Kinder admitted that "the vast majority, *if not all, of the calls* [were] made prior to May, 2007" when he reconnected his pager service. (Italics added.) Therefore, we found no need to address the assumption of the risk doctrine in our tentative opinion. Nevertheless, we find plaintiff's disconnection of his pager dispositive as to all the calls made *prior* to its reconnection. Indeed, as the trial court noted: "the Court's ruling as to the disconnection of the number would be dispositive. I addressed the assumption of the risk argument just because it was there and these other arguments just because they were there. [¶] . . . [T]he assumption of the risk portion [of the tentative ruling] is really not necessary to the ruling . . . [a]nd if I'm wrong on [the applicability of assumption of the

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2. *CALIFORNIA'S DOCTRINE OF ASSUMPTION OF THE RISK APPLIES TO ACTIONS FILED UNDER THE TCPA IN CALIFORNIA COURTS*

The trial court held that the California doctrine of assumption of the risk was applicable to plaintiff's TCPA actions pursuant to 42 United State Code section 227(b)(3), which provides an individual may pursue a private right of action under the statute in state court "if otherwise permitted by the laws or rules of [the] court of [that] state . . . ." Plaintiff contends that the court erred in determining that California's equitable defense of assumption of risk applied because it is a substantive, rather than a procedural rule, which should not be applied to a federal cause of action. We disagree.

"Congress directed that the TCPA be applied as if it were a state law. [Citation.] In other words, Congress drafted the TCPA so that it would interact with the federal and state judicial systems as would a state law. While the TCPA is not state law, Congress has clearly indicated that the courts should treat it as though it were. And so, for our purposes, it behaves like state law. Because the TCPA functionally operates as state law, we must apply the *Erie*[9] doctrine to the TCPA, though the requirement to do so derives from Congressional instruction, and not from the Supreme Court's decision in *Erie*."

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risk], it wouldn't make any difference." Only at defense counsel's insistence that assumption of the risk was relevant to those calls made *after* reconnection of the pager did the trial court find it necessary to address that issue. Thus, we shall separately address the applicability of the assumption of the risk doctrine as to those calls made *after* Kinder reconnected the pager.

9 *Erie Railroad Company v. Tompkins* (1938) 304 U.S. 64.

(*Bonime v. Avaya, Inc*. (2d Cir. 2008) 547 F.3d 497, 501.) Congress intended to create a federal statutory private cause of action enforceable in state courts by their choosing and did not intend that the TCPA apply uniformly, nationally. (*Murphey v. Lanier* (9th Cir. 2000) 204 F.3d 911, 915.) The TCPA itself directs that state substantive law should govern its application when brought in federal court under diversity jurisdiction. (See *Bonime*, at p. 501; *US Fax v. iHire* (10th Cir. 2007) 476 F.3d 1112, 1118; *Gottlieb v. Carnival Corporation* (2d Cir. 2006) 436 F.3d 335, 342; *Holster v. Gatco. Inc*. (E.D.N.Y. 2007) 485 F.Supp.2d 179, 183-185.) Similarly, the TCPA commands that state substantive law be applied to TCPA actions filed in state courts. (See *Kruse v. McKenna* (Co. Sup. Ct. 2008) 178 P.3d 1198, 1200.) Thus, the trial court correctly applied the California affirmative defense of assumption of the risk to the instant case.

3. *ASSUMPTION OF THE RISK AS TO THOSE CALLS MADE AFTER KINDER RECONNECTED HIS PAGER*

In *Knight v. Jewett* (1992) 3 Cal.4th 296, the California Supreme Court summarized the assumption of the risk doctrine: "In cases involving 'primary assumption of risk'—where, by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury—the doctrine continues to operate as a complete bar to the plaintiff's recovery. In cases involving 'secondary assumption of risk'—where the defendant does owe a duty of care to the plaintiff, but the plaintiff proceeds to encounter a known risk imposed by the defendant's breach of duty—the doctrine is merged into the comparative fault scheme, and the trier of fact, in

apportioning the loss resulting from the injury, may consider the relative responsibility of the parties." (*Id*. at 314-315.) The court concluded that, in determining which doctrine applied, the pivotal question was whether, in light of the nature of the activity involved, defendant breached a legal duty of care to the plaintiff, or rather, had a legal duty to protect the plaintiff against a particular risk of harm in the first instance.[10] (*Id*. at pp. 315, 316-317.)

"Whether the defendant owes a legal duty to protect the plaintiff from a particular risk of harm depends on the nature of the activity in which the defendant is engaged and the relationship of the defendant and the plaintiff to that activity. [Citation.] The existence and scope of the defendant's duty of care is a legal question to be decided by the court rather than the jury. [Citation.]" (*Curties v. Hill Top Developers, Inc*. (1993) 14 Cal.App.4th 1651, 1655.) "In secondary assumption of risk cases, the defense is merged into the comparative fault scheme and the trier of fact may consider the relative responsibility of the parties. [Citation.]" (*Ibid*.)

In the present case, for purposes of evaluating plaintiff's probability of prevailing in the litigation, there is no issue concerning duty. Defendants had a statutory duty not to

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[10] While the *Knight* court stated the doctrine applied to activities or sports, it nowhere limited its applicability. "Instead, it established the defense's governing principles of risk for application on a case-by-case basis." (*Saville v. Sierra College* (2005) 133 Cal.App. 4th 857, 871.)

call plaintiff's number and breached that duty by doing so.[11] Thus, the case falls squarely within the category of secondary assumption of risk, meaning the comparative fault of the parties must be considered.

Here, we find substantial evidence supported the trial court's determination that plaintiff had no reasonable probability of prevailing because he assumed the risk of defendants' calls when he reconnected his pager; thus, he was primarily, if not exclusively at fault, for proceeding to encounter a known risk imposed by defendants' behavior. Soon after initiating service with his new beeper number in September 1996, Kinder learned that it was unusable due to the volume of calls received. Kinder eventually received as many as 63,000 unwanted pages per month. He was never able to engage in any business with the number. Kinder soon disconnected the pager service converting it to a stand-alone voice mail. Edwards declaration asserted that "the number (619) 999-9999 is not currently connected to a pager, and has not been connected to a pager at any time since the year 2002. It is a stand-alone voice mail." Nevertheless, Kinder retained the number and hired staff to record and log the calls he continued to receive. Thus, Kinder apparently continued to receive a voluminous number of calls.

Nonetheless, more than 10 years later, Kinder reconnected his pager service despite no indication that the volume of calls had receded or with any valid contention that he wished to utilize it to engage in any legitimate business other than that of filing

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[11] We are, of course, left to ponder why some of the companies that apparently had approximately 10 years of notice that they were calling a number that exposed them to this type of lawsuit, continued to call that same number.

successive law suits. Indeed, the rational implication of Kinder's reconnection of service in May 2007, months after filing the instant case, is that defendants' began to assert that Kinder's disconnection of service invalidated his legal claims. Thus, Kinder attempted to circumvent defendants' legal defense by reconnecting his pager. We concur with the trial court's finding that "[t]he TCPA is not intended to apply to circumstances such as is presented in this case where the Plaintiff *intentionally* subjects himself to unwanted telephone calls and disconnects the number from his pager device, connects the number to a voice mail tape-recording system and employs a staff to listen to the voice mail messages and catalog the calls for the sole purpose of filing lawsuits." (Italics added.) As the court aptly reiterated, "[t]he court finds [Kinder]'s conduct of *intentionally* subjecting himself to unwanted telephone calls, as a matter of policy, precludes [Kinder]'s recovery under the TCPA."[12]

Plaintiff's citation to *Donovan*, *supra*, 1 S.W. 232, is particularly apt, but not for the proposition for which he cites it. There, the defendant's railroad ran through property owned by the plaintiff. By statute, railroad companies were obligated to fence their roads and were made liable to the owner of cattle for twice the amount of damages done to them by their failure to do so. The plaintiff erected a fence on three sides of his property; the property was bordered on the fourth side by the defendant's railroad. The plaintiff intended to pasture his cattle on the property; he requested defendant construct a fence along the fourth side of the property or, in the alternative, offered to construct the fence

[12] Plaintiff cited *Donovan v. Hannibal & S.J.R. Co.* (1886) 89 Mo. 147, 1S.W. 232 (*Donovan*).

himself at the defendant's expense. The defendant declined either proposition. Three days after the plaintiff put 40 cattle out to pasture, six to eight of them were "damaged" by defendant's rail cars. The defendant requested a jury instruction suggesting that if the jury found that the plaintiff put his cattle out to pasture on unfenced land through which a railroad ran, he could be found to have assumed the risk that they would be damaged. The trial court denied the request; the plaintiff apparently won the suit, the defendant appealed, and the appellate court affirmed the judgment. (*Id*. at pp. 232-233)

At oral argument, defendant argued that, unlike the property owner in *Donovan*, plaintiff actually metaphorically placed his "cows" on the railroad tracks hoping they would be stricken. We would extend the analogy even further: Plaintiff's actions are consonant with an individual searching for unfenced land through which a railroad ran, purchasing the property at above-market prices, placing cows upon the rails without ever communicating his intention of doing so, or requesting that the railroad "fence in" the road, ceasing the placement of cows on the railroad when their procurement became oppressive, but continuing to sue for hypothetical cows he could have continued to place on the railroad, and then, again, placing cows on the railroad when he discovered that he could not recover for hypothetical cows.

DISPOSITION[13]

The judgment is affirmed. Respondents are awarded their costs on appeal.

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[13] Defendant Allied Interstate, Inc.'s request for judicial notice filed on January 13, 2010, is denied. Likewise, Kinder's request for judicial notice received June 24, 2010, is denied.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ MILLER
J.

We concur:

/s/ RAMIREZ
P. J.

/s/ KING
J.